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No. 86-563

IN THE
Supreme Court of the United States
October Term, 1986

ANTONIO CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,
Petitioner,

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE, AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN CANCER SOCIETY, AMERICAN PUBLIC HEALTH ASSOCIATION, and PUBLIC CITIZEN

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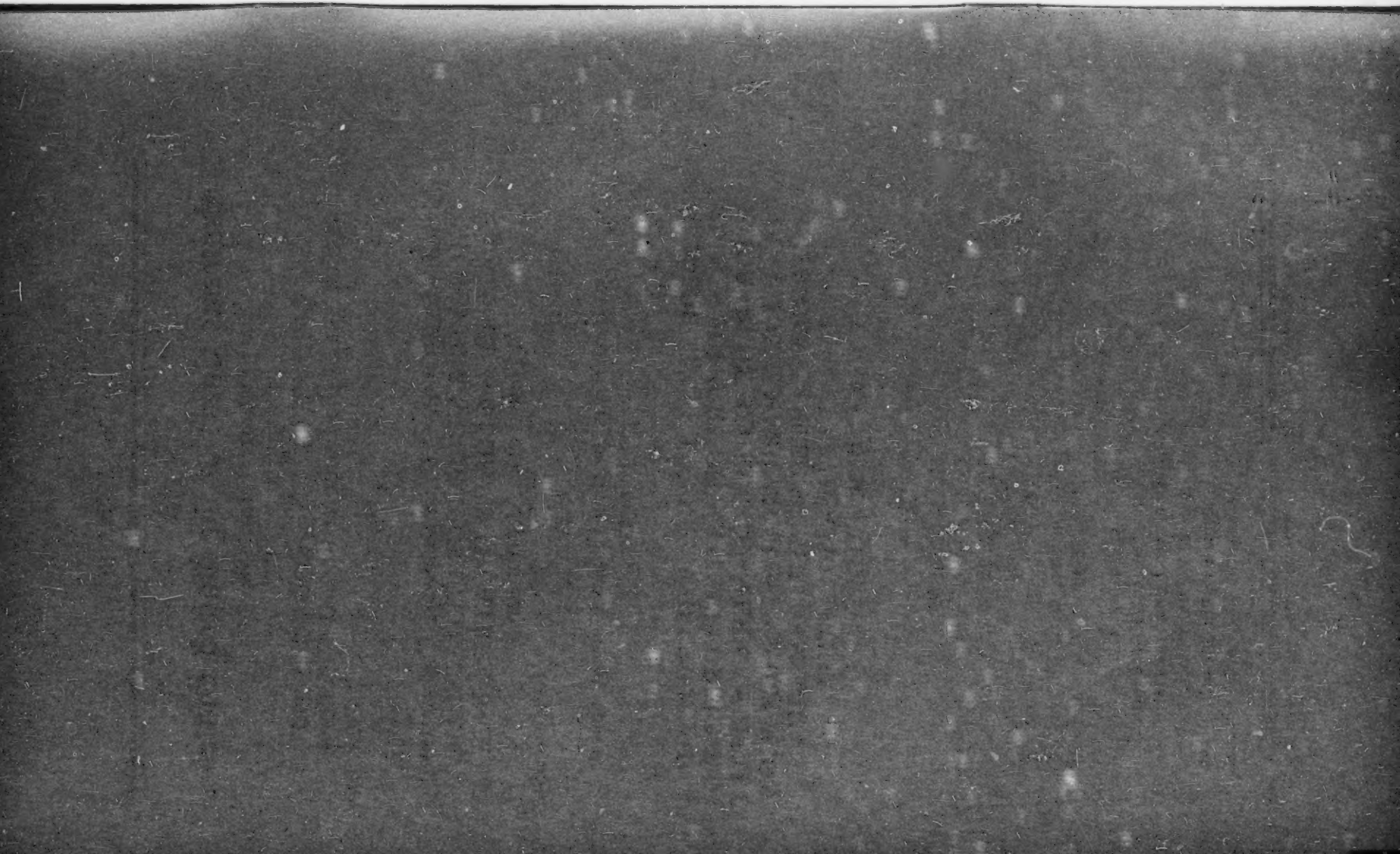

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MOTION OF AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN CANCER SOCIETY, AMERICAN PUBLIC HEALTH ASSOCIATION, AND PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION

The American Heart Association, American Lung Association, American Cancer Society, American Public Health Association, and Public Citizen move this Court for leave to file a brief *amicus curiae* supporting the petition for certiorari. Petitioner has consented to this motion, and respondents have stated that they take no position on whether it should be granted.

INTERESTS OF *AMICI*

The American Heart Association is this nation's second largest voluntary health organization. It has a volunteer force of over two million and a membership of over 120,000, including virtually all of the leading physicians in this country whose practice focuses on cardiovascular disease and stroke. The Association dedicates all of its efforts to the reduction of premature death and disability from cardiovascular disease and stroke, this nation's leading cause of death. It has identified cigarette smoking as one of the three major risk factors for coronary heart disease and, therefore, has devoted a substantial portion of its research and educational efforts towards the reduction of cigarette smoking.

The American Lung Association is this nation's oldest voluntary health organization, with 144 associations in all 50 states. Originally established in 1904 to reduce the incidence of tuberculosis, the Association broadened its work many years ago to address the full range of issues concerning the prevention, control, and cure of lung disease, through community education, professional programs, and the support of pulmonary research and professional education on both the national and local levels. The Lung Association has over 150,000 volunteers, including most of the nation's leading pulmonary physicians who belong to its medical section, the American Thoracic Society. Since cigarette smoking is the major cause of chronic obstructive pulmonary disease, including emphysema and chronic bronchitis, the Lung Association devotes a substantial portion of its resources to research and education efforts about the relationship between smoking and lung disease.

The American Cancer Society is the world's largest voluntary health organization. Its membership consists of 2.3 million volunteers, including over 50,000 physicians. The Society has 58 divisions and 3,400 unit organizations located in every state in the United States. The Society's sole purpose is the control and elimination of cancer through research, education, and service. In 1986 it is supporting more than $80 million in cancer-related research. Research supported by the Society has played an important role in the identification of cigarette smoking as a major cause of cancer in the United States. The Society devotes a substantial portion of its educational funds to better and more effectively informing the American public about the relationship between cancer and smoking. With the Heart Association and the Lung Association, the Cancer Society played a major role in persuading Congress to pass the Comprehensive Smoking Education Act of 1984.

The American Public Health Association, founded in 1872, is the oldest and largest professional public health society in the world, with combined national and affiliate membership of over 50,000 health professionals. Its members include physicians, dentists, nurses, social workers, and other health professionals, as well as academics and researchers specializing in public health matters. The Association publishes the American Journal of Public Health, a monthly peer review journal widely recognized in the field. The Association works to promote the health of the American people by advancing the availability of health services, encouraging a safe and healthy environment, launching public health education programs, and publishing numerous materials reflecting developments in public health. For many years, it has engaged in public education projects, emphasizing the health hazards of smoking, which it has determined to be the number one

preventable health hazard, as to both mortality and morbidity.

Public Citizen is a non-profit, public interest organization with approximately 70,000 members. Principally through its Health Research Group, it has worked to increase public knowledge about the health hazards of smoking, to calculate and publicize the economic costs of smoking, and to obtain more rational smoking policies in hospitals and workplaces. It was also instrumental in calling the public's attention to the dangers from smokeless tobacco and in persuading Congress to pass the Comprehensive Smokeless Tobacco Health Education Act of 1986.

REASONS FOR GRANTING THE MOTION

These five health groups seek leave to file the attached brief *amicus curiae* because of their concern about the potential impact that the decision below may have on their efforts to reduce the annual toll of 350,000 lives lost because of smoking. Their brief offers two reasons for granting certiorari that are not discussed in the petition.

First, their brief points out the unprecedented nature of the decision below. Although Congress included an express preemption provision in the Federal Cigarette Labeling and Advertising Act, the Third Circuit held that the bulk of petitioner's case was preempted, not by the express language that Congress used, but by what the court of appeals saw as the proper balance of interests in the legislation, and the implied preemption resulting from it. Second, their brief attempts to place this case in a broader perspective, in order to help the Court appreciate why the interests of judicial economy strongly favor review at this

time, even though there is presently no conflict in the Circuits.

WHEREFORE, the motion of the American Heart Association *et al.* for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN CANCER SOCIETY, AMERICAN PUBLIC HEALTH ASSOCIATION, and PUBLIC CITIZEN IN SUPPORT OF PETITION

INTERESTS OF AMICI

The interests of the *amici* are set forth in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

This action seeks damages for the illness and resulting death of petitioner's wife, Rose Cipollone, caused by her smoking of respondents' cigarettes. At various times, respondents have argued that the effect of the decision

below is to preempt virtually all of petitioner's claims, but there are two claims for relief that are most directly affected by respondents' preemption defense. First, petitioner alleges that respondents failed to warn Mrs. Cipollone adequately about what they knew to be the dangers from smoking. Petitioner does not contend that the law requires respondents to satisfy their obligation to warn in a particular way, so long as the information that they made available to Mrs. Cipollone was adequate to warn her of the dangers of smoking.

Petitioner's second claim is that respondents were forbidden from using false and misleading advertising to deceive Mrs. Cipollone into believing that she could smoke without endangering her health. Included as part of such a claim is the allegation that even if respondents' ads were not technically false and misleading, they were designed to, and had the effect of, negating the impact of the federally required warning labels mandated under the Federal Cigarette Labeling and Advertising Act, Public Law 89-92 (1965), as amended by the Public Health Cigarette Smoking Act of 1969, Public Law 91-222 (1970), 15 U.S.C. §§ 1331 *et seq.* (the "Labeling Act"). This basis for liability is different from respondents' affirmative duty to provide an adequate warning, because it arises only after respondents decided to speak on the issue of smoking and health. Had they remained silent, other than to include the federally required warning label, they could not be held liable under this theory. But once respondents decided to speak out about the relationship between smoking and health — whether directly in advertisements discussing smoking and health, or indirectly in advertisements which depict smoking as healthful and desirable — respondents had a duty to speak the truth. Therefore, petitioner argues, he may recover damages from

respondents if he can prove that their advertising campaigns were either false or misleading, or were deliberately contrived to overcome the effect of the federal warning label, and that those advertisements helped persuade Mrs. Cipollone to continue to smoke respondents' cigarettes, which resulted in her contracting lung cancer and eventually in her death from that disease.

As in virtually every products liability case involving cigarettes, respondents raised the affirmative defense that the Labeling Act preempts all claims based on both the duty to warn and false and misleading advertising.[1] Petitioner moved in the district court to strike that defense, and the district court granted the motion. Thereafter, the district court certified the preemption question under 28 U.S.C. § 1292(b), and the court of appeals agreed to accept the appeal on an interlocutory basis because of the importance of the issue in this case and in others pending in the Third Circuit.

The court of appeals then reversed the ruling of the district court, upholding the preemption defense. In doing so, it expressly rejected the argument that the section of the Labeling Act dealing directly with preemption, 15 U.S.C. § 1334(b), barred petitioner's claims based on a duty to warn and on false and misleading advertising (App. 13a-14a). Instead, relying on the declaration of policy set forth in 15 U.S.C. § 1331, it found a "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interest of national economy" (App. 16a). It then concluded

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[1] Appendix F to the petition sets forth the text of the Labeling Act as amended through 1970. It does not include the 1984 amendments made by the Comprehensive Smoking Education Act, Public Law 98-474, which were enacted after Mrs. Cipollone stopped smoking.

that this balance would be upset by permitting petitioner's tort claims to go forward, and held that "the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes," including any claim that "necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages . . ." (App. 17a, footnote omitted). A petition for rehearing and suggestion of rehearing *en banc* were denied, with two judges voting to rehear the case *en banc*. (App. 2a-3a).

REASONS FOR GRANTING THE WRIT

The Case Presents An Important Question Which This Court Should Decide Now.

In addition to the points raised in the petition, *amici* offer two additional reasons for granting the writ:

1. The decision of the court of appeals represents an unprecedented extension of the preemption doctrine. In the Labeling Act, Congress spoke precisely and directly to the issue of preemption in 15 U.S.C. § 1334. The court of appeals examined that provision and found that it did not sustain respondents' claims of preemption. (App. 13a-14a). However, instead of terminating its inquiry at that point, the court found an implied preemption of state law based on the general declarations of purpose contained in section 1331 and what it concluded was the proper balancing of interests under the Act.

This approach is inconsistent with that used at least twice by this Court just last Term in preemption cases.

Thus, in *Louisiana Public Service Comm'n v. FCC,* 106 S. Ct. 1890 (1986), and *Wardair Canada Inc. v. Florida Dep't of Revenue,* 106 S. Ct. 2369 (1986), this Court looked to the portions of federal statutes that addressed the same subject as the preemption claim. In each case it concluded that there was no preemption of state law, without embarking on an open-ended inquiry into congressional intent based on various general statements of purpose, as the court of appeals did here. Those cases stand for the proposition that, in general, where Congress has spoken specifically on the subject of preemption of a particular area of state law, the courts should look solely to the statutory language in resolving the question of federal preemption. Applying that principle to the instant case, the court below should have ended its inquiry once it ruled that the express language of the Labeling Act did not provide a basis for a preemption of New Jersey's products liability law.

The one arguable exception to this general rule is *Jones v. Rath Packing Co.,* 430 U.S. 519, 540-43 (1977), but there the Court held that preemption was required because the state law (which regulated the method for weighing flour) would otherwise have defeated the central purpose of the federal statute. Similar considerations are not involved here since allowing New Jersey to apply its product liability law to cigarettes would strengthen the principal purpose of the Labeling Act — to increase the available information about the dangers of smoking.[2]

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[2]As to the secondary purpose of the Act — to relieve the tobacco industry from the possibility of having to comply with certain conflicting state laws — that will continue to be met for all affirmative state law labeling and advertising requirements. The only arguable advantage gained by the industry under the Labeling Act which might not be preserved is immunity from state tort claims based on failure to warn

(cont'd.)

The decision of the Third Circuit to go beyond the congressionally mandated preemption language into the uncharted waters of implied preemption seriously threatens to undermine the law of preemption. Thus, when the Third Circuit extended its search for congressional intent beyond section 1334 and its relevant legislative history, it turned that search into an open-ended inquiry, under which the court independently balanced what it saw as the appropriate interests and reached what it thought was the proper result, without regard to what Congress legislated explicitly in section 1334. Such an expansion is particularly unwarranted in view of both the presumption against preemption, *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981), and the well-established principle that the question of whether state law is preempted is a matter of congressional intent. *See Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248-58 (1984). Accordingly, review is necessary in order to correct a major analytical error made by the court of appeals in attempting to ascertain congressional intent regarding the extent of the preemption in the Labeling Act, an error which, if left unchecked, could also affect the analysis of other preemption claims based on other statutes besides the Labeling Act.[3]

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or false and misleading advertising. Of course, whether Congress intended to give that advantage to the tobacco industry is the question presented in this petition, but however it is answered, it is indisputable that all of the other purposes identified in the Labeling Act and its legislative history will remain intact, in contrast to *Rath Packing.*

[3] *Amici* agree with the Third Circuit that the terms "requirement or prohibition" in section 1334(b) do not extend to common law tort obligations involving the duty to warn, or to claims based on false and misleading advertising. In *amici's* view, a detailed examination of the legislative history makes clear that Congress did not preempt tort actions such as this for four principal reasons. First, the manufacturers never asked for, and hence never received, such preemption. Instead, they were concerned only with eliminating conflicting affirmative

(cont'd.)

2. Although we recognize that there is no conflict in the Circuits at this time, we urge the Court to decide this issue now for several reasons. First, the question presented is purely one of law and requires no further development of the record. Second, the issue is mature since it has also been briefed and recently argued in the First Circuit in *Palmer v. Liggett Group, Inc.*, No. 86-1525 (argued Oct. 9, 1986), and has been briefed but not yet argued in *Roysdon v. R.J. Reynolds Tobacco Co.*, No. 86-5072 (6th Cir., docketed Jan. 20, 1986). In addition, the First Circuit is virtually certain to have decided *Palmer* before this Court hears oral argument in this case since this Term's calendar is already nearly full and will almost certainly be so before this petition can be granted.

The interests of judicial economy further counsel in favor of immediate review. There are more than 100 active cases seeking damages based on death and illness caused by smoking. These cases are pending in six federal circuits

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obligations imposed by state laws dealing with labeling and advertising requirements. Second, the original version of section 1334(b) was narrow, it was narrowly construed by the D.C. Circuit in *Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969), and when Congress substantially re-enacted this provision in only slightly modified form, it did not indicate any intent to broaden it to cover matters found not to be included in *Banzhaf*. Third, preemption here would leave the public with no protection since there were no congressionally imposed advertising requirements until 1984, and there are no congressionally created, alternative damage remedies to replace those which respondents urge were preempted. Finally, the preemption argument extends not only to the claim based on respondents' failure to warn, but also to the claim that they deliberately engaged in a campaign of false and misleading advertising which was intended to, and did in fact, override the mandated warning labels. The extraordinary breadth of this preemption claim provides further support for the proposition that no such sweeping change in the law of torts was intended by Congress in the Labeling Act.

and in the courts of approximately 15 states.[4] In every one, the preemption issue is the company's first line of defense, and the question will necessarily be litigated in each of them until this Court settles the matter. In the meantime, there will continue to be an enormous expenditure of effort and money by litigants, as well as trial and appellate judges. In fact, since the petition in this case was filed, at least one state trial court in New York has rejected a preemption defense, *Montana v. R.J. Reynolds Tobacco Co.*, ____ N.Y.S.2d ____ (Sup. Ct. St. Law. Cty., No. 79850, Oct. 9, 1986), and the Eleventh Circuit has agreed to hear an interlocutory appeal by a losing plaintiff on this issue. *Stephen v. American Brands, Inc.*, No. 86-2106 (Order of Oct. 29, 1986). Moreover, it is by no means certain that even if a conflict in Circuits arises when an appeals court rejects the preemption defense, this Court will be asked to take the case, since it is entirely within the control of the manufacturers as to whether to seek review in this Court, or to be satisfied with those Circuits in which they have prevailed.

Finally, even though respondents will undoubtedly oppose review, it should be noted that they have twice argued the importance of resolving this issue as a basis for interlocutory review. Thus, following both the district court ruling in this case, and that of the District of Massachusetts in *Palmer, supra*, respondents recognized the exceptional need to have this issue decided promptly and sought immediate review under 28 U.S.C. § 1292(b), rather than await a final judgment. Those same reasons which counseled in favor of, and were persuasive to, the

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[4]The figures are based on the efforts of the Tobacco Products Litigation Reporter to monitor smoking litigation. Its list of current cases is found at 1.10 TPLR 9.1 - 9.11 (1986).

courts of appeals in granting interlocutory review in both cases, as well as to the court in *Stephen v. American Brands, Inc., supra,* are equally persuasive reasons for this Court to accept review now and to decide whether Congress actually intended to preempt all state tort law smoking claims based on the failure to warn or false and misleading advertising.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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